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OFFICE OF PETITIONS

In re Application of
Jacob N. Wohlstadter, et. al.
Application No. 08/932,985
Filed: September 18, 1997
Attorney Docket No. 370208-6220

DECISION DISMISSING
PETITION

This is a decision on the petition, filed May 7, 2007, requesting that the above-identified application be accorded a filing date of September 17, 1997, instead of the presently accorded date of September 18, 1997 under the provisions of 37 CFR 1.10(c). The delay in responding is sincerely regretted.

The petition is **dismissed**.

Paragraph (c) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that there is a discrepancy between the filing date accorded by the Office to the correspondence and the date of deposit as shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation, may petition the Commissioner to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in" and of any other official notation by the USPS relied upon to show the date of deposit.

The petition lacks the showing required by item (1) above.

A review of the record shows that this patent issued on July 2, 2002. However, a petition under the provisions of 37 CFR 1.10(c) and the required evidence was not filed until May 7, 2007, which is over 5 years from the date of issuance.

Further, it is noted that a Notice of Allowance and Fee(s) Due was mailed on February 22, 2002 and the issue fee was timely paid on May 20, 2002. On June 13, 2002 an Issue Notification was mailed and the application subsequently issued as U.S. Patent No. 6,413,783 on July 2, 2002. Both the Notice of Allowance and the Issue Notification contained a recitation of the September 18, 1997 filing date, and represented a reminder that the date had not been corrected. Any petition to accord the above patent a filing date of September 17, 2007 should have been filed prior to the payment of the issue fee. Instead, applicant paid the issue fee on May 20, 2002, and allowed the application to issue with the September 18, 1997 filing date. By paying the issue fee, applicant acquiesced to the September 18, 1997 filing date accorded the application.

35 U.S.C. 254 states in part, "Whenever a mistake in a patent, incurred through the fault of the Patent and Trademark Office, is clearly disclosed by the records of the Office, the Director may issue a certificate of correction stating the fact and nature of such mistake, under seal, without charge, to be recorded in the records of patent."

In this case, there is nothing in the record, filed prior to issuance, which suggests that the filing date for the above application was incorrect. However, the record is clear that a petition to correct the filing date along with the Express Mail label was not presented until years after issuance; therefore, the above patent properly maintained a filing date of September 18, 1997.

Additionally, the showing of record points to a lack of diligence on the part of petitioner, and, in light of the extended delay, this petition is clearly untimely and subject to dismissal.

35 U.S.C. Chapters 25 and 30 provides for the amendment and correction of patents. In the absence of legislative intent to the contrary, when a statute expressly provides a specific remedy for a situation, the statute is deemed to exclude other remedies for such situations.¹ Therefore, any amendment or correction of the filing date of the application for the above-identified patent must be authorized by the provisions of 35 U.S.C. chapters 25 or 30.

35 U.S.C. Chapter 25 provides for the amendment and correction of a patent by: (1) reissue (35 U.S.C. §§ 251 and 252); (2) disclaimer (35 U.S.C. § 253); (3) certificate of correction (35 U.S.C. §§ 254 and 255); or (4) correction of named inventor (35 U.S.C. § 256). 35 U.S.C. chapter 30 provides for the amendment of a patent as a result of a reexamination proceeding (35 U.S.C. §§ 302 through 307).

The requested change to the filing date of the application for the above-identified patent does not involve disclaimer (35 U.S.C. § 253), correction of a named inventor (35 U.S.C. § 256), or an amendment (in reexamination) to distinguish the invention from the prior art or in response to a decision adverse to patentability (35 U.S.C. § 305). In addition, the requested change to the filing date of the application for the above-identified patent does not concern a mistake "clearly disclosed by the records of the [PTO]" (since petitioner did not present an "Express Mail" label showing a "date-in" inconsistent with the filing date accorded the application for the above-identified patent until after issuance of the application into a patent).²

Since the office is restricted by statute to act on a paper to change a filing date after the application has issued as a patent, the petition cannot be granted.

¹See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (*expressio unius est exclusion alterius* (the mention of one thing implies exclusion of another thing) is a standard principle of statutory construction); see also Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929) ("when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode").

²See 35 U.S.C. § 254.

Any request for reconsideration of this decision should be filed within **TWO MONTHS** of the date of this decision in order to be considered timely (see 37 CFR 1.181(f)) and should be delivered through one of the following mediums:

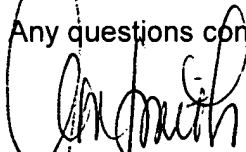
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 Alexandria, VA 22314

By fax: (571) 273-8300
 ATTN: Office of Petitions

By Internet: EFS-Web³

Any questions concerning this matter may be directed to the undersigned at (571) 272-3226.



Andrea Smith
Petitions Examiner
Office of Petitions

³ www.uspto.gov/ebs/efs_help.html (for help using EFS-Web call the Patent Electronic Business Center at (866) 217-9197)